IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	**CRIMINAL**
	:	
v.	**:**	**NO. 05-193-2, 7, 11–14**
	:	
AKHIL BANSAL, SANJEEV SRIVASTAV, FRED MULLINIX, KELLY ANN COUCHMAN, MATTHEW MELAO, CHRISTOPHER LAINE	**:**	

Diamond, J. **March 1, 2006**

MEMORANDUM

The Government has charged Defendant Akhil Bansal as one of seventeen individuals who allegedly participated in an international conspiracy — involving India, the United Kingdom, France, Norway, Canada, Ireland, Sweden, Germany, the British Virgin Islands, Belize, and Samoa — to distribute illegal prescriptions drugs, including Darvocet, Codeine, Ativan, Xanax, Valium, Viagra, and Ketamine. Through their alleged sales of these drugs on the Internet, Defendant and his coconspirators allegedly made millions of dollars, which they purportedly funneled into multiple foreign bank accounts. Defendant and his father, Brij Bansal, are said to be the leaders of the organization. See Superseding Indictment (Doc. No. 208).

The Government's investigation involved several United States Attorneys' Offices, at least a dozen other federal agencies, and Government personnel stationed around the world. N.T. of Jan. 31, 2006, at 36. At least two grand juries returned indictments in the case: one sitting in the Eastern District of Pennsylvania and one sitting in the Eastern District of New York. Id. at 37. On April 6, 2005, the Pennsylvania grand jury returned an eighty-one page indictment

charging Defendant with forty-four counts, including: (1) conspiracy to distribute controlled substances; (2) conspiracy to import controlled substances; (3) continuing criminal enterprise; (4) conspiracy to introduce misbranded drugs into interstate commerce; (5) conspiracy to commit money laundering; (6) promotional money laundering; (7) international money laundering; and (8) transactional money laundering. 21 U.S.C. §§ 846, 963, 848; 18 U.S.C. §§ 371, 1956(h), 1957.

Among the investigative tools the Government employed were Court-ordered wiretap interceptions of the e-mail accounts through which the conspiracy allegedly conducted its business. See 18 U.S.C. §§ 2510 et seq.; Gov't Exh. 1a, "Order Authorizing the Interception of Electronic Communications;" Gov't Exh. 3a, "Order Authorizing the Continued Interception of Electronic Communications." Although Court-ordered telephone interceptions are common, this was the first investigation in the Eastern District of Pennsylvania involving e-mail interceptions. It was also the first time nationally that an investigation (which also included myriad search warrants), yielded such a huge volume of seized e-mail messages — over 12,000. N.T. of Jan. 31, 2006, at 12, 14, 62; N.T. of Feb. 21, 2006, at 30; Gov't Exh. 1c, "Second Progress Report," at 5. As a result, the investigation was plagued with technical difficulties and errors, some of which ultimately caused delays in the sealing of the e-mail evidence. Defendant Bansal has moved to suppress these e-mails, arguing that they were not timely sealed pursuant to 18 U.S.C. § 2518(8)(a). Bansal's co-defendants have joined in this Motion.

On January 31, 2006 and February 21, 2006, I conducted a suppression hearing at which former Assistant United States Attorney Barbara Cohan, Drug Enforcement Administration Special Agent Eric Russ, and DEA Computer Specialist Charles David Bradley testified. Based

on my review of all the evidence presented, I deny Defendant's Motion. I make the following factual findings and legal conclusions.

FINDINGS OF FACT

The Government obtained approval for the e-mail interceptions from the Honorable Legrome Davis. See Gov't Exh. 1a. As set out below, the novelty of this investigative technique, good faith mistakes, the enormous number of seized e-mails, and technical problems created difficulties and delays.

A. *The Wiretap Operation*

The e-mail accounts the Government sought to intercept belonged to Defendant Bansal and his father: drakhil@hotmail.com and drbrijbansal@hotmail.com. Gov't Exh. 1a. As e-mails were sent to or from the accounts, MSN Hotmail automatically forwarded a copy of each to a "shadow account" located elsewhere on Hotmail's servers. N.T. of Feb. 21, 2006, at 23; Gov't Exh. 3. Each address had a separate "shadow account." N.T. of Feb. 21, 2006, at 23; Gov't Exh. 3. Every fifteen minutes, an automated process logged into these "shadow accounts" and downloaded the retrieved e-mails into "case folders" on computers at the DEA Office in Lorton, Virginia. N.T. of Feb. 21, 2006, at 23–24; 26–27. Each e-mail was time-stamped, and the data was write-protected so that only three individuals — all unfamiliar with the Bansal investigation — could access or change the content of the e-mails. Id. at 32–33. The system then forwarded these e-mails automatically to "source folders" on computers in the DEA's Philadelphia Office. Id. at 24, 26–27. The "source folders" in Philadelphia are identical to the "case folders" in

Lorton. Id. at 26–27. As with the "case folders," only the three individuals in Virginia had access to the "source folders" in Philadelphia. Id. at 33. The Philadelphia computer automatically copied all e-mails from the "source folders" to "monitor folders," and Agent Monitors otherwise unconnected with the Bansal investigation reviewed each such e-mail and flagged it as "pertinent" or "minimized." Id. at 29–30; N.T. of Jan. 31, 2006, at 45–47. These Monitors had no access to the "source folders." N.T. of Feb. 21, 2006, at 30.

"Pertinent" intercepted e-mails were copied to a laptop computer that contained a database of all the pertinent e-mails retrieved in the case, both from intercepts and search warrants. Id.; N.T. of Jan. 31, 2006, at 14, 47–48; Gov't Exh. 1d, "Third Progress Report," at 7. In Philadelphia, Agent Russ remotely accessed the database, downloaded the e-mails onto his computer, and burned CDs of these pertinent e-mails for AUSA Cohan — the attorney in charge of the investigation during this period — who read them all and provided a written summary of their contents to Judge Davis approximately every ten days. N.T. of Jan. 31, 2006, at 52, 72; Gov't Exh. 1d. At the expiration of each Court-ordered interception period, Russ burned CDs of all the e-mails contained in each "source folder." One copy of each CD was sealed by Judge Davis. N.T. of Jan. 31, 2006, at 73–74, 76. Another copy was filed with the DEA custodian and kept in the DEA Office. N.T. of Feb. 21, 2006, at 4. All the copies are read-only CDs, so that it is impossible to modify, delete, or write over the data on them. Id. at 32.

B. *Wiretap Difficulties and Mistakes*

In no previous wiretap investigation had the DEA attempted to store pertinent e-mails on a laptop. Id. at 30. Though the Monitors had no difficulty scanning and classifying the e-mails

as pertinent or minimized, Russ was often unable, for days at a time, to download the pertinent e-mails from the laptop's database. N.T. of Jan. 31, 2006, at 72–73. The problem persisted throughout the entire investigation, despite repeated efforts to remedy it — including visits to Philadelphia by DEA personnel from Lorton. Id. at 48, 72–73; Gov't Exh. 1b, "First Progress Report," at 2; Gov't Exh. 1c at 1; Gov't Exh. 1d at 1. This delayed Russ's creation of a CD for Cohan's use, but did not affect his ability to burn a CD of the "source folders." N.T. of Jan. 31, 2006, at 73, 76; N.T. of Feb. 21, 2006, at 30–31.

Cohan had no special training in computers or software. N.T. of Jan. 31, 2006, at 12, 42–43,51–52, 59. Although she had worked on many investigations involving telephone wiretaps, this was the first time Cohan (or her Office) had participated in an investigation involving e-mail interceptions. Cohan performed her duties diligently, but she did not fully understand the wiretap operation or its technical problems. She believed that until Russ could download the pertinent e-mails to his computer, "there was nothing to seal." Id. at 20. Unaware that Russ actually burned CDs for sealing from the "source folders" containing both pertinent and minimized e-mails (rather than from the database of all pertinent e-mails), Cohan believed there could be no sealing until Russ could download the pertinent e-mails to his laptop and the material was in "usable form." Id. Cohan correctly understood that e-mail intercepts admissible at trial were limited to those actually sealed by the Court. She thus mistakenly concluded that the CD she received from Russ, containing only those "pertinent" e-mails she planned to use at trial, would be identical to what Russ presented to the Court for sealing. N.T. of Jan. 31, 2006, at 20, 51–52. Thus, although the problem involved only Russ's ability to create a CD containing pertinent e-mails, Cohan believed the problem prevented Russ from creating *any* CD. Id. at 20.

Cohan also erroneously believed that the technical problems resulted from the number of e-mails in the database — over 12,000 from the wiretaps and search warrants combined — rather than from the DEA's inexperience in setting up a laptop database. Id. at 14; N.T. of Feb. 21, 2006, at 30. She thus thought — incorrectly, as it turns out — that the problem could not be fixed easily as long as the number of e-mails kept growing. Cohan described her understanding of these technical problems both in her testimony before me and in three of the six Progress Reports she submitted to Judge Davis. It is clear that she came to her mistaken understanding of the problems in good faith, and that she found the problems vexing. See Gov't Exh. 1b; Gov't Exh. 1c; Gov't Exh. 1d.

C. *The Interceptions and Sealing Orders*

I summarize the time-line for each of the Government's two e-mail interceptions as follows:

Authorization	**Start Date**	**End date**	**Sealing date**
January 12	January 12	February 10	February 17
March 1	March 3	April 1	April 11

See § 2518(8)(a) Gov't Exh. 1a; Gov't Exh. 1e, "Sealing Application" and "Order"; N.T. of Jan. 31, 2006, at; Gov't Exh. 3e, "Sealing Application" and "Order"; N.T. of Jan. 31, 2006, at 4–5, 15–17. Pursuant to these authorizations, the Government downloaded 5482 messages. See Gov't Exh. 3d, "Sixth Progress Report," at 3.

D. *Reasons for the Delays*

As I have noted, the United States Attorney's Office in Philadelphia had never before conducted e-mail surveillance under Title III. N.T. of Jan. 31, 2006, at 12. As a result, "it was kind of a learning process for all" those working on the Bansal investigation. Id. Once again, technical problems unrelated to the sealing process arose that prevented Cohan from reviewing the e-mails until several days after they had been received. Id. at 48; N.T. of Feb. 21, 2006, at 30. These technical problems led to Cohan's mistaken belief that Russ was unable to create any CD for sealing. This belief caused the delays of several days in both Sealing Orders. N.T. of Jan. 31, 2006, at 20, 51–52.

Judge Davis's first Intercept Order expired on February 10, 2005. On that date, Russ could have created a CD from the "source folders," as he eventually did. Id. at 74. Cohan first received a CD of all pertinent e-mails from the interception on February 15, 2005, however, and believed that this was the first date on which a "usable" CD was available for sealing. Id. at 21–22. Two days later, on February 17, 2005, she and Russ presented to Judge Davis the CD Russ had created from the source folders, and Judge Davis sealed it. Id. at 77.

Judge Davis's second Intercept Order expired on April 1, 2005. On that date, Russ could have created a CD from the "source folders." Cohan first received a CD of all pertinent e-mails from the second interception on April 5, 2005, however. Once again, Cohan mistakenly believed that this was the first day on which any CD was available for sealing. Three days later, on Friday, April 8, 2005, she and Russ presented the source CDs to Judge Davis for sealing. Id. at 33, 42. Judge Davis was not available on that day. Id. at 31–33. Cohan considered asking the Emergency Judge to seal the CD. Id. Unfortunately, Judge Davis was the Emergency Judge that

week. Id. at 33. Thus, Cohan presented the CD to Judge Davis for sealing the next day he was available — Monday, April 11, 2005. Id.

There is a nineteen-day gap between the expiration of the first authorization (February 10) and the beginning of the second (March 1). This resulted from a misunderstanding between Cohan and the DEA Agents working on the case. As Cohan credibly described, "Apparently, the agents had been thinking all along that we would seek an extension that had never been discussed. I assumed that because of the enormous number of e-mails that we had intercepted, that there would be no need for a second period of interception." N.T. of Jan. 31, 2006, at 16. Thus, the decision to renew was not made until approximately February 9, 2005 — a day before the end of the first Intercept Order. Id. at 17. Cohan was then required to draft an affidavit and extension application for review and approval by the Criminal Division of the Department of Justice in Washington, D.C. Id. at 17–20. Unfortunately, Cohan had other duties at this time. For instance, she prepared the eighty-one-page indictment and presented it to the Pennsylvania grand jury. Id. at 33, 37. She also coordinated the Philadelphia portions of the international investigation. Id. Moreover, once she received the pertinent e-mails from Russ, she worked long hours — sometimes through the night — reviewing the material. Id. at 36. As a result of these other duties, she did not complete the affidavit — which ran to 123 pages — and the extension application until February 24, 2005, when she sent a fax marked "Urgent" to the Criminal Division, seeking expedited consideration. See Gov't Exh. 2b. She did not receive approval until February 28, 2005. See Gov't Exh. 2c. The next day, March 1, 2005, she obtained from Judge Davis a second e-mail intercept authorization. See Gov't Exh. 3a.

Although regrettable, the delays at issue here were not the result of sloth, inattention, or

carelessness on the part of Cohan or the DEA. Cohan was an experienced prosecutor who had previously secured wiretaps — though not e-mail wiretaps. She understood and fully intended to comply with the Title III requirement that a judge seal interceptions as soon as administratively practical after termination. Id. at 19. Indeed, she believed she *had* complied with the requirement. Id. She repeatedly asked the DEA technical staff to fix the problems that she mistakenly believed were causing delays in creating CDs that could be sealed. Id. at 48, 52. In light of this unique combination of difficulties — the inexperience with e-mail interceptions, the huge volume of e-mails, and the technical problems — I find that Cohan's mistaken understanding as to when CDs were available for sealing was a reasonable mistake made in good faith.

E. *The Integrity of the Evidence*

Despite the brief delays in sealing these read-only CDs, the Government has proven that none of the data was altered or corrupted as a result. In preparing for the evidentiary hearings, Russ made additional copies of the CDs stored in DEA custody — the CDs duplicated from the "source folders" contemporaneously with those sealed. N.T. of Feb. 21, 2006, at 3–4. These copies were sent to Bradley, who compared them to the "case folders" on the computers in Lorton, Virginia. Id. at 31–34. He could find no difference between them. Id. at 34.

CONCLUSIONS OF LAW

The law provides that the contents of any e-mails intercepted through the use of wiretaps must,

> [i]mmediately upon the expiration of the period of the [O]rder, or extensions thereof, . . . be made available to the judge issuing such [O]rder and sealed . . . . The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any . . . electronic communication or evidence derived therefrom under [§ 2517(3)].

18 U.S.C. § 2518(8)(a). Section 2517(3) provides for "disclos[ure of] the contents of [the e-mails] or such derivative evidence while giving testimony in any [court] proceeding . . . ." Suppression is the appropriate remedy only when a District Court determines that (1) there has not been an "immediate" sealing and (2) the government has not offered a "satisfactory explanation." United States v. Ojeda Rios, 495 U.S. 257, 264–68 (1990).

The Third Circuit has interpreted "immediate" to mean "as soon as administratively practical." United States v. Carson, 969 F.2d 1480, 1487 (3d Cir. 1992). A "satisfactory explanation" is one that is "objectively reasonable"; it must "explain not only why a delay occurred but also why it is excusable." Rios, 495 U.S. at 265–66. An extension request must also be "immediate" or "satisfactorily explained." Thus, "an [O]rder authorizing surveillance of the same subject, at the same location, regarding the same matter as an earlier authorized surveillance, constitutes an 'extension' . . . if, but only if, the new authorization was obtained as soon as administratively practical or any delay is satisfactorily explained . . . ." Carson, 969 F.2d at 1487.

Here, there was a seven-day gap between the end of the first interception and the first sealing, a nineteen-day delay in seeking a second Intercept Order, and a ten-day gap between the end of the second interception and the final sealing. Since the decision in Ojeda Rios, virtually no

court has found gaps of these lengths to be "immediate," and I decline to do so here. See, e.g., United States v. Wong, 40 F.3d 1347, 1375 (2d Cir. 1994) ("[S]ealing within one or two days will normally be deemed immediate . . . and . . . longer delays require suppression unless the government furnishes an explanation for the delay that is satisfactory within the meaning of the statute" (citations omitted)); Carson, 969 F.2d at 1490 ("We do not believe . . . that a delay of [ten days] in ultimately sealing the tapes will often satisfy the statute's immediacy requirement . . . ."); id. ("[A]pproval of gaps of [seventeen days] between the expiration of a surveillance [O]rder and its extension without requiring explanation would contravene the teaching of Ojeda Rios and threaten to obliterate any meaningful distinction between a gap in a particular surveillance and the termination of that surveillance."). Indeed, by presenting evidence of the technical difficulties and mistakes to explain the sealing delays, the Government impliedly concedes that the CDs were not sealed "as soon as administratively practical." See Gov't's Br. Accordingly, I must consider whether the Government has offered a "satisfactory explanation" for each delay.

A. *Delay in Seeking an Extension*

When an extension has been granted, sealing need not occur until the expiration of the final authorization. United States v. Quintero, 38 F.3d 1317, 1326 (1994). Thus, if I consider the second interception an "extension" of the first, the Government need not explain the seven-day delay in the first sealing because it occurred before the expiration of the second Order. Id.

The Government seeks to justify the nineteen-day gap between interceptions by offering its own uncertainty as to whether to continue the Bansal wiretaps. The Third Circuit has held, however, that this is not a "satisfactory explanation." See Carson, 969 F.2d at 1491. In Carson,

the Government unsuccessfully sought to justify a seventeen-day gap between interceptions. The Government explained that because the target of its investigation was hospitalized toward the end of the first interception period, the prosecutor was uncertain as to whether the target would be discharged and resume use of the tapped phone. Id. at 1485, 1491. As it turned out, the target was discharged after the expiration of the first authorization and did resume use of the that phone. Id. at 1485. After the expiration of the first wiretap authorization, the Government sought an "extension," which the District Court granted. Id. The Third Circuit ultimately concluded that the second Order was not an extension of the first. The Court held that a "judgment" made by an attorney is "a circumstance removed from the practical process of procuring an extension," and as such, cannot excuse a delay. Id. Such uncertainty, the Court said, "should require the government to decide promptly whether to seek or forego an extension." Id.

I believe Carson controls here. Although part of the delay was caused by Cohan's preparation of a 123-page affidavit, she did not begin that preparation until February 10th at the earliest (after Judge Davis's first Order had expired), when the Government belatedly decided it would continue the Bansal intercepts. Under Carson, the Government's indecision cannot excuse a nineteen-day delay. Accordingly, I do not consider the second interception to have been an "extension" of the first.

B. *Delays in Sealing*

Cohan's mistake respecting when a CD was available for sealing caused the seven and ten day delays at issue here. Given that this was the first time she or her Office had ever worked on a Title III e-mail intercept, the volume e-mails, and the attendant technical problems, I believe

Cohan's mistake was objectively reasonable. Because she believed that Russ was unable to create any CD for sealing until she received a CD of pertinent e-mails, she did not seek to seal anything until shortly after she received her copy. She sought to seal each set of CDs within two or three days of when she thought it was possible to do so. If Cohan's belief had been correct, such brief delays would have been "as soon as administratively practical" under the statute. See Carson, 969 F.2d at 1498 (five and six-day delays considered as soon as administratively practical).

The Third Circuit has noted that delays in sealing generally occur when: (1) the Government acts in bad faith or seeks a tactical advantage; (2) the Government misconstrues the law; (3) administrative necessity, mistake, obstacle or other unexpected circumstances arise. United States v. Vastola, 989 F.2d 1318, 1327 (3d Cir. 1993). As I have found, the Government made its mistake here in good faith; it was not seeking a tactical advantage. Nor is this an instance where the Government misconstrued the law or encountered administrative delays. Rather, this case involves a mistake of fact. Although the Third Circuit has yet to decide what factual mistakes will satisfactorily explain sealing delays, the Supreme Court has held that mistakes of law are satisfactory if they are "objectively reasonable." Ojeda Rios, 495 U.S. at 266; Quintero, 38 F.3d at 1325. Moreover, other courts have determined when a factual mistake satisfactorily explains a sealing delay. For instance, the Second Circuit has found an explanation to be satisfactory "where the government advanced a bona fide reason, there was no reason to believe there was any deliberate flouting of the Title III requirements, no reason to doubt the tapes' integrity, and no basis for inferring any other prejudice to the defendants." United States v. Maldonado-Rivera, 922 F.2d 934, 950 (2d Cir. 1991); see also United States v. Maxwell, 25 F.3d 1389, 1394 (8th Cir. 1994) (seven-day delay caused by judge's availability and the preparation of

paperwork); United States v. Pitera, 5 F.3d 624, 627 (2d Cir. 1993) (delay due to miscalculation of authorization expiration date); United States v. Sawyers, 963 F.2d 157, 161 (8th Cir. 1992) (district attorney mistakenly thought federal law on sealing was similar to Nebraska law); United States v. Rodriguez, 786 F.2d 472, 477–78 (2d Cir. 1986) (listing cases and explanations deemed satisfactory).

The Government's explanation offered here meets the requirements set out by the Second Circuit. Cohan's mistake was not made in bad faith. As I have found, she took her duties seriously, intended to comply with the Title III sealing requirements, and, in fact, believed she had done so. Judge Davis entered the first Sealing Order on February 17, 2005, two days after Cohan believed the sealing requirement was triggered. She sought the second Sealing Order on Friday, April 8, 2005, three days after she believed the sealing requirement was triggered. Because Judge Davis was unavailable until Monday, April 11, 2005, that is when the sealing actually took place. Additionally, through the testimony of Bradley and Russ, the Government has proven the integrity of the sealed evidence. Although Defendant contends that Bradley could have employed more sophisticated methods of comparing the sealed CDs and "source folders," Defendant has not presented any evidence credibly suggesting that the integrity of the Government's e-mail evidence has been compromised. Nor has the Defendant shown that the brief delays at issue here caused "any other prejudice." Maldonado-Rivera, 922 F.2d at 950.

Finally, the Third Circuit has held that "[t]he length of a sealing delay is a relevant factor in considering whether an explanation is satisfactory." Quintero, 38 F.3d at 1329 (citing Carson, 969 F.2d at 1498). Courts have suppressed telephonic intercepts when the sealing delays were twice as long as those here. See, e.g., id. at 1330 (where there was a sealing delay of twenty days

and no satisfactory explanation, tapes should have been suppressed). Where, as here, a good faith, objectively reasonable mistake has prevented the timely sealing of evidence, courts have generally admitted the evidence. See Maldonado-Rivera, 922 F.2d at 950 (tapes left unsealed for up to 118 days admissible); United States v. Pedroni, 958 F.2d 262, 266 (9th Cir. 1992) (delay of fourteen days).

Courts necessarily determine on a case-by-case basis whether the Government has satisfactorily explained a sealing delay. In the highly unusual — indeed, unique — circumstances presented here, I believe the Government has offered a satisfactory explanation for the seven and ten day delays at issue. Accordingly, I deny Defendant's Motion to Suppress.

An appropriate Order follows.

BY THE COURT.

/s Paul S. Diamond, J.

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CHRISTOPHER LAINE	**:**	

ORDER

AND NOW, this 1st day of March, 2006, upon consideration of the Motion to Suppress Evidence Derived from Electronic Surveillance Conducted over Defendant's E-mail Accounts (Doc. No. 308), the Government's Responses, the evidence presented at the suppression hearing, and any related submissions, it is ORDERED that the Motion is **DENIED**.

BY THE COURT.
/s Paul S. Diamond, J.

Paul S. Diamond, J.